IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator de bonis non of the Estate of L. E. Haney, Deceased,
Petitioner,

vs.

J. M. KURN et al., Trustees of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

## SEPARATE BRIEF

**Of Illinois Central Railroad Company (a Respondent Herein) Opposing Issuance of Writ of Certiorari.**

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## INDEX.

**Cases Cited.**

**Textbooks Cited.**



**Statute Cited.**

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**Of Illinois Central Railroad Company (a Respondent Herein) Opposing Issuance of Writ of Certiorari.**

### JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked by petitioner under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, U. S. C. A., Title 28, Section 347.

This Court undoubtedly has jurisdiction to consider and grant the writ herein prayed for, if, in the judgment of the Court, the record in the case in the Supreme Court of Missouri, justifies the issuance of the writ, which this respondent denies.

## OPINION OF THE COURT BELOW.

It is correctly stated in the brief of petitioner that the case in which the Supreme Court of Missouri rendered its opinion is reported in 189 S. W. (2d), at page 253, and appears on pages 320-331 of the transcript of the printed record filed by petitioner in this Court.

## STATEMENT OF THE CASE.

While the history of the litigation—that is, as to the various proceedings, filing of pleadings, trial of case, appeal to Supreme Court of Missouri, decision by that Court, filing and overruling of motion for rehearing—is correctly set forth in the petition filed in this Court, this respondent is by no means satisfied with the statement of facts set forth in petitioner's petition for writ of certiorari. On the contrary, as this respondent will show to the Court, there are glaring errors in said statement of facts and for that reason the statement is exceedingly unfair, so that it is deemed necessary to make a full statement of the evidence, and thereafter to set forth corrections of erroneous statements made by counsel for petitioner.

### The Evidence.

Haney's employment was that of a switch tender. It was a part of his duty to regulate certain overhead signal lights which were controlled from the shanty in which he had his office, and which governed the movements of certain trains.

On the evening in question, shortly before 7:30 o'clock, Haney set the lights from his shanty so that they would show red and stop north and south bound traffic in the Illinois Central terminal yards and would permit a Frisco interstate train from Birmingham, Ala., to Memphis, Tenn., to cross over the Illinois Central tracks in the terminal

yards, and then proceed westwardly until it passed a certain long switch which was west of the terminal yards. Haney then threw that switch so that the Frisco passenger train could back over it eastwardly into the terminal yards and then northwardly into the Grand Central Station. It was Haney's duty to remain near the switch until the entire train passed completely over the switch point and passed the switch stand, and then throw the switch back again and see to it that the light on the switch was changed from red to green. While waiting for that train to pass, Haney's proper place was on the south side of the track. His next duty was to go back to his shanty, about 300 feet to the east, and change the overhead lights so that they would show green for north and south bound traffic in the terminal yards (Rec. pp. 32, 33).

After the Frisco train passed over the switch all of the lights remained red. Therefore, Bruso, foreman of one of the switching crews, whose engine had been stopped by the overhead lights, went to the switch stand and found Haney lying unconscious north of the Frisco track and west of the switch stand. He returned to the yard, sent a man to call for an ambulance, and took another switchman (Bundy) back with him to where Haney was lying unconscious (Rec. p. 32). It was found that Haney had been struck in the back of the head, apparently by some blunt instrument which crushed his skull. He never regained consciousness, and was dead when the ambulance carrying him arrived at the hospital, to which he was sent.

One of plaintiff's witnesses (Gates) testified (Rec. p. 29) that many transients, both black and white, were around the railroad yards in the neighborhood of the scene of the accident in question, both day and night, seeking chances to steal rides on trains.

The switch track ran east and west near the place where Haney was found unconscious. When Bruso and Bundy arrived, Haney was lying on the ground, face down; was

a little north of the switch and a little west of it, his head pointed at a kind of an angle towards the south and his feet extended northward at kind of an angle. His head **was about six feet north** (Rec. p. 32) of the switch stand and a little to the west of it. **Haney was about 5 feet 10 inches in height and his feet were about ten feet north of the north rail of the switch track, extending straight back of him and not doubled under him,** so plaintiff's witness Bundy said (Rec. p. 32). There was evidence of an injury on the back of his head in the form of a gash about two inches long, which was bleeding. Bruso and Bundy turned Haney over and then discovered his pistol and his lantern under him. The switch had not been closed after the train had backed over it to the station and the red light on the switch stand was still showing (Rec. p. 32).

The two men turned Haney around and raised his head and Bundy squatted down and took Haney's head on his lap and held it until the ambulance driver came to take him to the hospital (Rec. p. 33). There was no evidence of any other injury, except where Haney's face had struck the cinders. His watch and his diamond ring were found on him, but his pocket book with his money in it was missing. The pocket book was found a week later about two blocks from the scene of accident. Haney's money was gone.

Plaintiff had, long before the trial, taken the deposition of John Joseph Drashman, who was coach foreman for the Frisco Railroad, having charge of supervising repairs and anything connected with passenger cars. Drashman, being present at the trial, plaintiff called him as a witness.

He testified that he was on duty on the evening of December 21, 1939, at the Grand Central Station about half a mile north and east of the scene of the accident. Having been informed about 7:40 P. M. that an accident had occurred, Drashman went with the superintendent of termi-

nals, Mr. Young, on foot, down to the place where Haney had been found unconscious.

It appears that Drashman became very much confused at the trial as to what he had testified to in his deposition. It was shown that in his deposition he had testified that he made two trips to the scene of the accident, and that on the first trip he found Haney still on the ground, unconscious, at the scene of the accident; that he returned to the station, made an inspection of both sides of the train, found nothing swinging out from it or extending out from it (Rec. p. 75), and then came back to the scene of the accident, and by that time Haney had been sent to the hospital. At the trial Drashman positively denied that he made more than one trip to the scene of the accident and said that Haney had been removed before he got down to the scene, and, therefore, he did not see Haney at all, but he gave the same testimony as to inspection of the train as he had given in his deposition.

Both in his deposition and at the trial Drashman was permitted to testify, over strenuous objections by all of the defendants, through their counsel, that while he was investigating at the scene of the accident, some unknown person, whom he took to be an I. C. railroad switchman, stated in his hearing in a group of men who had gathered there that he thought that something sticking out from the side of the train had struck Haney and injured him. Both in his deposition and at the trial Drashman said that he did not know who that man who made the statement was, but that said man did not claim to have been present or to have seen the accident happen (Rec. pp. 48-62).

These statements of Drashman, as to what was said by an unknown man at the scene of accident, were objected to as hearsay, but were admitted by the court on the theory that they constituted a part of the res gestae.

The baggage cars and the mail car had sliding doors which are on the inside about six inches from the outside

of the cars, and the Pullmans and day coaches all had vestibule doors which opened toward the inside of the cars. There were, of course, no freight cars in that high class passenger train (Drashman's testimony, Rec. p. 67).

There was a railroad track used by two other railroads than the Frisco, about 25 feet north of the Frisco switch. About midway between those two tracks was an accumulation of cinders and dirt about 18 inches to two feet in height and running a considerable distance east and west, which resulted from the accumulation of sweepings from the two tracks.

The hospital record of St. Joseph's Hospital in Memphis was offered in evidence and showed that Haney was dead when he arrived at the hospital. In the history of the case contained in the hospital record it was stated that there was an abrasion to the right posterior part of the head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions, and that cinders were ground into the skin on the right side of the face (Rec. p. 78).

The report of the autopsy showed no injuries other than those above mentioned (Rec. p. 79). It was recited that there was a traumatic fracture of the skull with associated meningeal hemorrhage.

The physician who examined Haney to ascertain whether he was dead or alive when he arrived at the hospital (Dr. W. E. Turner, Jr.), testified for plaintiff that he was the one who had made the record and he was present when the autopsy was performed. He testified: "Our conclusion was that the skull was fractured by some fast moving small, round object. I guess it would be possible for that small round, fast moving object to have been a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe." He said in cross-

examination: "It is very possible, in my opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or other similar round object also in the hands of some individual" (Rec. pp. 78-79).

C. Bruce Farmer, a railway postal clerk who had been employed by the United States Government on railway postal cars for many years, was called by plaintiff as an expert witness to show the structure of mail catcher arms on the sides of mail cars (Rec. pp. 96-101).

He testified that such cars vary from 30 to 60 or 70 feet in length. He identified Defendants' Exhibits C and D (Rec., opposite p. 120) as correct photographs showing such a mail catcher arm, Exhibit C showing it down at the side of the car while not in use, and Exhibit D showing it when raised in such position that it can catch a mail pouch above a station platform. He testified that he had measured several such mail cars and the space between the level of the ties of a track on which the cars stood and the bottom of the mail catcher arm when not in use. He found that on the Frisco mail car which he measured the distance was 80 inches from the level of the ties to the lower end of the mail catcher arm when down, and when the same arm was swung out into position to catch a mail pouch, it was 87 inches from the top of the ties to the mail catcher arm (Rec. p. 97).

In all his experience he had never known such a mail catcher arm, when hanging down at the side of the car, to swing out more than a foot from the side of the car (Rec. p. 97), and it did that only in the event that the train was being very rapidly run or was going around a curve. When the door was open, and only when it was open, a mail clerk inside the car could catch hold of the lever above the cross-piece of the catcher arm and pull it inward and downward and cause the mail catcher arm to swing up into position to catch a mail pouch, and it would

then be about 9 feet above the top of ties, and extend out about 30 inches from the side of the car (Rec. p. 99).

Haney's son testified that on the morning following the accident he saw a spot of blood (at least he took it to be blood) on the cinders about six or eight feet east of the switch stand in question and three or four feet north of the rail and that the ground north of that point for some distance east and west was rough and uneven (Rec. p. 93).

**Evidence as to Employer of Haney.**

In an effort to prove that Haney was an employee of the Illinois Central Railroad Company, plaintiff's counsel, while the widow of Haney was on the witness stand, offered in evidence the pay checks for Haney's wages, which checks were twelve in number, covering periods of two weeks each from July 15, 1939, through the second period of December, 1939, the last check being dated December 30, 1939 (Rec. pp. 86-87).

All of these checks were payable to L. E. Haney, and all but the two for two periods in December, 1939, bore Haney's endorsement, which was identified by the widow, who testified that he got the money represented by all of those checks except the one dated December 15, 1939, and the one dated December 30, 1939, which last two mentioned checks were paid to her after Haney's death, by a special arrangement which she made with the Yazoo and Mississippi Valley Railroad, whereby she was permitted to endorse and collect those two checks (Rec. p. 91).

Except as to the dates, the periods covered and the amounts, the checks were exactly alike. A photostatic copy of a specimen of the checks will be found on page 105 of the record. It will be seen that at the top of the check are the words, "The Yazoo & Mississippi Valley Railroad Company." In the lower left-hand corner are the words "To Treasurer, The Yazoo & Mississippi Valley Railroad

Company" and the names of three banks, one in Chicago, one in St. Louis and one in Memphis, are given as banks through which the checks are payable.

An emblem of the Illinois Central System is found in the upper left-hand corner with the words "Illinois Central" printed across the emblem. At the bottom of the check is printed a similar emblem with the same words, and at the right of those words is the name "G. C. Lyon," both the last mentioned emblem and the name being under the word "Countersigned." In the right lower corner are the words "R. E. Connelly, Treasurer." On the back of each of the checks except the last two is the signature "L. E. Haney," which Mrs. Haney identified. On the last two checks dated December 15, 1939, and December 30, 1939, respectively (one of which is reproduced by photostatic copy opposite page 104 of the record), the following appears: "Pay to the Order of Mrs. L. E. Haney, Account deceased. The Yazoo & Mississippi Valley Railroad Company, A. R. Huttig, Assistant Treasurer, Countersigned G. C. Lyon." Then appears the endorsement, "Mrs. L. E. Haney."

Mrs. Haney further testified: My husband had a little button that he wore.

Q. What did the button say on it? A. I think it was the lodge he belonged to.

Q. Did it show any name or anything? A. I thought it had YMV on it.

On the same subject, Haney's son, Alvin Arthur Haney, (Rec. p. 93) testified that he worked with his father during the Christmas season before his death. He said: "As far as I know, I thought I was working for the I. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid, as far as I

remember, the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind, while I was there. As far as I remember, I thought it had 'Illinois Central' across the top of it, 'Railroad Brothers Trainmen' or something. He wore that on his cap while he was working."

On the same subject the daughter, Mrs. Marjorie Haney Linsom, testified: "I have seen my father wear a button when he worked. It was a round button and it has 'Illinois Central' or 'I. C. Railroad' on it. It was just the initials 'ICRR.' He wore the button on his cap. He had a railroad pass and on that was 'The Illinois Central.' He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time * * *. My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had 'Illinois Central' on it and it was issued to L. E. Haney, Employee. * * *. I believe the pass that I speak of had the name 'Illinois Central System' on it. I didn't see that it had Y&MV on it also. I never saw the button that my father wore on his coat or vest. The one on his cap had 'Brotherhood of Trainmen' on it. It did not have 'IC System' on it. It did not have Y&MMV on it. It had 'ICRR Brotherhood of Trainmen.'"

There was no evidence offered tending to show that the place where Haney was killed was inside of the terminal yards covered by the contract above mentioned or that said place was in anywise owned or controlled by the defendant Illinois Central Railroad Company.

It was admitted that the passenger train for which Haney had thrown the switch very shortly before he was killed was operated by the Trustees of the Frisco, who had been regularly and duly appointed, and that said train was an interstate train operating between Birmingham, Ala., and Kansas City, Mo., through Memphis, Tenn., and that, therefore, both Haney (in throwing the switch) and said defendant trustees were engaged in interstate commerce; and it was also admitted that the Illinois Central Railroad Company was engaged in operating trains through various states at said time.

**Defendants' Evidence.**

On the part of the defendants the evidence tended to show the following facts:

When Bruso, I. C. switching foreman, went to the scene of the accident, as above stated, to learn why the switch light was not changed, he found Haney (Rec. p. 110) **14 feet west of the switch stand and his head was lying five feet nine inches from the north rail** of the track and **his feet were straight back of him 13 or 14** feet away from **said north rail. There were two marks on the little mound of dirt and cinders which indicated that as he fell forward Haney's feet dragged down the south side of the mound, and those marks were plainly visible the following morning.** His drawn pistol and his lantern were under him. Bruso and Bundy, whom Bruso had promptly summoned to help him, turned Haney over and **turned him around so that he was lying either on the mound or on the edge of it with the length of his body approximately east and west, and Bundy raised Haney's head,** as already mentioned in an earlier part of this statement (Rec. p. 11).

Bruso then went to the shanty where Haney had his headquarters, broke the glass in the locked door (Rec. p. 111) and reached in and changed the overhead lights so

that north and south bound traffic could proceed, and then he went on in the discharge of his ordinary duties.

About eight o'clock that evening Ora L. Young (a witness called by defendants), the Superintendent of Terminals for the Frisco in the Central station, went with Drashman to the scene of the accident. Only one trip was made down there. As they were on their way down there Mr. Young looked the train over on both sides and found nothing whatever out of order, no open doors, nothing swinging or projecting from the train, and nothing at all unusual on either side of the train.

On returning from the scene of the accident Mr. Young carefully inspected two cars which had been left in Memphis by Frisco train No. 106, a baggage car and the mail car (Rec. p. 124). He made a particular examination of the mail car at that time and testified fully as to the condition of the mail catcher arm which he had not been able to inspect before, because there were men working inside of that car whom he did not want to disturb. Everything about the mail catcher arm was in its usual condition (Rec. pp. 132-133).

On the morning following the accident Bruso accompanied two city police officers and a special agent of the Frisco Railroad to the scene of the accident and pointed out to the police officers the place where Bruso had found Haney lying. A white pencil was placed at the point where the spot of blood coming from his head had been found and another pencil at the point where his feet were found. A photographer was present and he took two photographs of the scene, which are reproduced in the record as Exhibits A and B, respectively, and will be found opposite page 120. The two white pencils show very plainly in Exhibit B.

As to the employment of Haney, the evidence on the part of the defendant Illinois Central Railroad Company showed very clearly that Haney was employed exclusively

by the Yazoo & Mississippi Valley Railroad Company and was carried on the payroll of that company for many years. His superior, the trainmaster, Mr. Burns, who had been employed exclusively by that railroad for many years, testified that he knew Haney and knew that he was employed by that railroad alone.

The evidence showed there are three railroads embraced in the system known as "Illinois Central System," to-wit: Illinois Central Railroad Company, which operates a line of railroad from Chicago, Illinois, to Memphis and points farther south; Yazoo & Mississippi Valley Railroad Company, which is a separate railroad corporation and operates a system of railroads in and about Memphis and other points in the South, and the Gulf & Ship Island Railroad, which operates a railroad in the southern portion of our country.

The Yazoo & Mississippi Valley Railroad Company, at regular intervals, billed the Illinois Central Railroad Company for two-twelfths of Haney's wages, representing the time he was employed in throwing switches and setting signal lights for the Frisco Railroad trains (Rec. p. 130); the Illinois Central Railroad Company paid those bills and in turn collected said two-twelfths of Haney's wages from the Frisco Trustees, pursuant to the terms of the contract above mentioned (Rec. pp. 129-130).

Haney's wages were paid to him at all times by the Yazoo & Mississippi Valley Railroad Company. He was employed by that company alone (Rec. p. 159).

The button worn on Haney's cap was a button such as the Brotherhood of Railroad Trainmen furnished to all its members every month, regardless of the railroad by which they were employed. They were used as evidence to other men to show that their dues were paid up to date. No such button ever bore the name or the initials of any railroad company. A sample of such button is reproduced by photostat opposite page 128 of the abstract. The wording

on it is "100% for my country and brotherhood," which legend begins near the rim of the button on the left side and runs over the top to the right side. At the bottom of the button is "Feb. 1943." In the center of it is a capital letter "T," which stands for trainmen, and that letter is in the center of a representation of the spokes of a wheel.

By the Frisco engineer, Mee, who was in charge of the engine on that same train, it was shown (Rec. pp. 146-147) that as the train moved backward towards the station onto the switch he was looking towards the rear of the train in an easterly direction and could see along the side of the train a considerable distance. He saw nothing projecting or swinging from the mail car or any other part of the train, and did not see Haney or any other person on the north side of that switch as the train passed over it.

It was also shown by Mee (Rec. p. 151) that rule 104 of the standard rules for train operations requires a switch tender under such circumstances as existed at said time and place, after throwing the switch to cross to the opposite side of the track and wait until the train passes.

Similar testimony was given by the witness Bruso when he was recalled to the stand after having given a part of his testimony (Rec. p. 153).

There was not a particle of evidence anywhere in the entire record showing or tending to show that this respondent owned or controlled the track on which the Frisco train was being operated on the night of Haney's death, or that it owned or controlled in any way the ground on which such track was located or the ground on either side thereof. On the contrary, the undisputed evidence clearly showed that said track was laid in a public street of the City of Memphis, Tennessee (Rec. p. 126).

## CORRECTION OF ERRONEOUS STATEMENTS OF FACT IN THE PETITION AND IN THE BRIEF FILED BY PETITIONER IN THIS COURT.

1. On page 5 of the petition, in the third paragraph on said page, it is erroneously stated that the evidence shows that Haney was killed * * * "by interstate Frisco passenger train No. 106."

There is not a word in the entire record which bears out such a statement. No one testified that he saw Haney struck by any train or anything else, and the facts brought out in the evidence afford no circumstantial evidence which justifies such a conclusion.

2. On page 6 of said petition and in the first paragraph on said page, it is stated "during the time the train was backing past Haney at about eight or ten miles an hour, something struck Haney in the back of the head, knocking him to the ground and rendering him unconscious."

This is a mere surmise by plaintiff's counsel. No evidence shows that Haney was struck while the train was passing him. The only direct evidence as to where Haney was while the train was passing him is that of the witness Creagh, the Frisco conductor, who was on the east platform at the east end of said train, and who testified that after throwing the switch Haney crossed to the south side of the track and was there when the conductor last saw him as the train passed.

3. On the same page (6) of said petition and in the second paragraph thereof, there is a statement as to what Dr. Turner, the hospital witness who pronounced Haney dead on his arrival at the hospital and was present at the autopsy testified. It is set forth thus by plaintiff's counsel on said page: "That in his opinion, Haney's injury and death was caused by a small, round, fast moving object striking Haney in the back of the head, which could have

been a rod fastened to a train backing at the rate of eight or ten miles an hour." In support of that quotation counsel cite pages 283 and 286 of the record.

Turning to said page 283, we find this question by plaintiff's counsel: "Q. Now, in your opinion, could that small round fast moving object be a rod or something projecting out from a train that was going eight or ten miles an hour?" After objection the doctor answered as follows: "A. I guess it would be possible, as far as I know about it, but I don't know anything about it, and I think it could be."

In cross-examination and on page 288, the witness further testified: "Q. And it is very possible then, in your opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object? A. Yes. Q. Also in the hands of some individual? A. Yes, it could be."

4. On page 7 of the petition herein in the first paragraph of said page, it is stated that plaintiff's witness Farmer (the railway mail clerk called as an expert by plaintiff) testified "that the mail hooks were not fastened at the bottom and would pivot and swing out 12 inches on the sway of the train."

But in explanation of that statement, in cross-examination, the same witness said (Rec. p. 98): "In backing in at a speed of ten miles an hour or less, over a switch if the track was smooth that would not throw the mail catcher out from the bottom of the car at all, but if the track was wavy, it might."

No evidence was offered to show that the track was wavy or otherwise in bad repair.

5. On page 7 of the petition filed herein, it is stated "witness Drashman testified that the mail hooks could swing out three feet from the side of the train." That is an incorrect quotation from the testimony of the witness

on that subject on page 269 of the record. The following questions and answers on the subject are found on that page of the record as follows: "Q. And how does that work? A. One side of it is fastened through brackets down against the side of the car, with a handle on top. Q. Can that be extended out to the side of the train? A. Yes. Q. How far out to the side of the train can that mail hook be extended? A. You can swing it out three feet."

The testimony as quoted would indicate that Drashman had said that the hook could swing out by itself a distance of three feet, but upon examining the questions and answers it clearly appears that he was testifying how a man could swing it out, which he explains elsewhere by saying that a clerk inside of the mail car could take hold of the lever when the door is open, pull down on the lever and thus swing the hook out.

It appears from the testimony of that same witness on page 73 under examination by plaintiff's counsel that he testified that the hook can be extended out to the side of the train, you can swing it out three feet to the tip end of the hook.

And on page 74, testifying in regard to the same mail catcher arms or hooks, the witness said "They do not sometimes swing out from the side of the train, the weight holds them against the side of the car." And on page 75 of the record, the witness said "There is no way to move that handle except as the U. S. mailman in the car moves it. It moves from in the doorway. In other words, he presses down on the handle on the inside of the car, and that brings the pouch catcher up on the outside about 8 feet above the rail. * * * you can raise them up, but they will not swing out with the motion of the car."

6. Near the bottom of page 7, of the petition, a statement is made that a light was erected over the switch immediately after the accident.

The statement on which counsel for petitioner base that statement is found in the testimony of plaintiff's witness Gates (Rec. p. 27) as follows: "There were no lights there and none near there. There has been light put up since then right near this spot where Haney was killed. It wasn't there at the time when he was killed. It is near the switch and shines on or near it. Elsewhere plaintiff's counsel state that the light was erected by the respondents herein (Pet. p. 24), but there is no evidence to justify such a statement. Since the scene of the accident was in a public street of the City of Memphis, the only fair inference is that any additional light which was erected after the accident was erected by the authorities of said city.

In support of his statement about the light, plaintiff also says on page 7 of his petition, that such evidence is found in the evidence of the witness Mee, pages 309 and 310 of the record. But the record at that place clearly shows that the statement on that subject by Mee was purely voluntary and was stricken from the record by the court on motion of respondents herein.

7. On page 13 of plaintiff's petition herein, it is stated that the opinion of the Supreme Court held that a mail hook could have struck Haney but that it did not. That is an unfair statement of the holding of the Missouri court. At page 325 of the record, it will be found that the Supreme Court said: "It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 inches." But the court holds that there was no substantial evidence to show that Haney was standing at a place where he could have been struck by said mail hook. The court then held in the last paragraph of its opinion (Rec. p. 331) that it would be mere speculation and conjecture to say that Haney was struck by the mail hook and that therefore the plaintiff

failed to make a submissible case. The court did not hold, as stated by petitioner, "that a mail hook could have struck Haney but that it did not." The court made no finding as to whether the hook did or did not hit Haney, but held, as above stated by us, that "That it would be mere speculation and conjecture to say that Haney was struck by the mail hook."

On page 17 of the petition it is erroneously stated "that after the train passed he was found unconscious lying face down within 5 to 6 feet from the track over which the train had passed, with his head pointing in the direction of the movement of the train." The only witness called by plaintiff who was present before Haney was turned around by Bundy and Brusso, was the witness Bundy, it appearing that nobody else arrived at the scene until they had turned the body around. Therefore statements by Drashman and Gates as to where they saw the body lying when they got there are in no wise helpful in determining how Haney was struck. Neither Brusso nor Bundy testified that Haney when found was lying with his head pointed towards the east in the direction in which the train was moving. Plaintiff's witness Bundy said (Rec. p. 32) his head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle, and straight back of him and his feet were about 10 feet north of the north rail while his head was about 6 feet from the switch, and a little to the west.

On page 18 of the petition, is this statement: "There was no evidence of any kind that anything else could have killed Haney." That statement is not correct. Plaintiff's own witness, Gates, testified (Rec. p. 29) that at the period covering the accident, he knew there were large numbers of hobos, tramps and transients about those tracks at night attempting to hop trains to get rides on them. Both white

and colored transients of the character mentioned were around there day and night.

Haney's pistol was found under him when he was turned over by Bundy and Brusso and it was either on or very near his hand, and his lantern was also under him.

While Bundy expressed the opinion that the pistol might have fallen out of his pocket, there is no evidence that it did so, and on the contrary, his widow testified that he carried his pistol in a holster (Rec. p. 90).

8. The statement on page 20 of the petition to the effect that when mail hooks on mail cars round curves they will swing outwards a distance from 12 inches to 3 feet from the side of the car is not supported by the evidence. While Farmer testified that they can swing out a short distance he said (Rec. p. 97) "they won't swing out more than 12 inches without that (referring to their being moved by the mail clerk)." In the sentence immediately preceding that he said: "If the door is open, they can swing out as far as 26 inches to 3 feet, but they won't swing out unless somebody pulls them up; somebody has got hold of the handle and pull them up."

On page 23 of the petition, counsel say "We submit the evidence on this point was clear and positive, that the Illinois Central switchman had said that: 'something sticking out from the train hit Haney' and 'that is true.' "

That statement is quite misleading. Referring to page 255 we find the portion of the redirect examination of Drashman referred to above. What occurred was as follows:

> "Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.
>
> Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at the time."

It is perfectly plain from the context that Drashman was being asked if it was true that he had made the statement in his testimony to the effect that the unknown man in question was, in his opinion, an Illinois Central switchman, and that his statement that it was an Illinois Central switchman who quoted the statement of the unknown speaker to Drashman was an Illinois Central switchman, not that the statement was true, as the way in which counsel sets up the quotation on page 23 would indicate.

On page 37, in their brief herein, counsel again erroneously state that the evidence showed that when Haney was found his head was pointing in the general direction in which the train had just backed in. The evidence of Bundy in cross-examination, which is found on page 216, and cited by petitioner's counsel, does not bear out that statement, but contradicts it squarely, for the following questions and answers on that subject are found on page 216:

> "Q. How far was his head north of the north rail of the track? A. I would say about 5 feet, 5 foot and a half.
>
> Q. And then his feet were something like 5 feet or so on north of that? A. Yes, sir.
>
> Q. From his appearance, did he appear to have fallen forward or backward? A. Forward."

9. On page 38 of petitioner's brief herein, counsel repeat the erroneous statement that the mail hooks would pivot and swing out from the side of the car 14 inches to 3 feet. We have already corrected that statement and cited the record in support of our corrections under 8.

On page 41 of their brief, petitioner's counsel state that Drashman testified that Haney's body was lying parallel to the track over which the train had just been backed. At page 264 of the record, Drashman did testify that he thought that the whole body was lying about 6 feet north

of the track and that he believed his head was lying towards the west, but he said he was not sure.

It will be remembered that Bundy and Brusso had turned Haney over and changed the position of his body before Drashman or any other witness arrived.

On page 46 of their brief, counsel for petitioner again make the erroneous statement that when found Haney's body was lying with his head pointing in the direction in which the train had backed. This has been corrected by us repeatedly.

## SUMMARY OF ARGUMENT.

I.

The trial Court erred in overruling this respondent's demurrer to the evidence at the close of all the evidence in the case, for the following reasons:

(a) The statements of an unknown man in the group gathered at the scene of the accident some time after it occurred, which the trial court permitted a witness for plaintiff to repeat, did not meet the requirements of the rule relating to admitting statements as part of the res gestae, and, therefore, constituted no substantial evidence whatever as to the way in which Haney was fatally injured. There was no other evidence to show how he was injured; hence the demurrer to the evidence should have been sustained.

The evidence offered by plaintiff conclusively showed that nothing sticking out of the train or swinging from it struck Haney.

(b) Even if it could be said that plaintiff's evidence tended to show that some object protruding from or swinging from the train might have struck Haney, or that his death was just as probably due to another cause, but the evidence failed to point clearly to the true cause of his death, such evidence would not be enough to justify submitting the case to the jury, and the Supreme Court of Missouri was right in so holding.

(c) Even if the evidence had shown that Haney's death resulted from being struck by an object projecting or swinging from the Frisco train, the accident would have been so unusual that it could not reasonably have been foreseen by a reasonably prudent person in this respond-

ent's situation in the exercise of ordinary care, and, for such an accident, a defendant is not liable. Hence, this respondent's demurrer should have been sustained.

(d) A master cannot be held liable for injury to a servant which results from a defect in an appliance or in a working place furnished the servant, unless it is shown that the master had either actual knowledge or constructive notice of such defect.

Neither actual nor constructive notice of an object projecting or swinging from the Frisco train was brought home to the appellant, Illinois Central Railroad Company, and hence respondent's case against it falls to the ground.

(e) There must be a duty owed and a breach thereof, before there can be negligence. The duty to keep the streets on which the Frisco track was laid properly illuminated, and free from obstructions, such as piles of gravel and cinders, rested upon the City of Memphis, not upon this appellant, for it had no control of the street and no duty or right to light it or remove piles of cinders or gravel from it, and hence this appellant could not be held guilty of a breach of such duty.

(f) The presence of the pile of cinders and gravel was not a proximate cause of Haney's death. He could have stood upon that pile of gravel and cinders safely all night if a separate intervening cause had not produced his injury and death. The proximate cause is what the law regards; and a causal connection between an alleged negligent condition or act and injury or death must be shown, or there can be no recovery on that account.

(g) The plaintiff sued the wrong railroad as Haney's employer. The suit was erroneously brought against Illinois Central Railroad Company. Documentary evidence identified by plaintiff's witness, Haney's widow, as well

as overwhelming and uncontradicted oral testimony offered by this appellant, showed conclusively that Haney's employer was not Illinois Central Railroad Company, but the Yazoo & Mississippi Valley Railroad Company, which was not made a party to this suit.

One who was not an employee of a defendant at the time of injury cannot recover damages of such defendant for such injury, nor can his personal representative maintain a suit under the Federal Employers' Liability Act for damages for his death.

## ARGUMENT.

### I.

The demurrer to the evidence at the close of the case should have been sustained because:

(a) No admissible evidence whatever tended to show that Haney was killed by an object protruding from or swinging from the Frisco train.

The testimony as to a declaration by an unknown person in a crowd some time after Haney had been injured was admitted on the theory that such declaration constituted a part of the res gestae. Aside from that statement, the record is entirely bare of any suggestion of an object protruding or swinging from a car.

### RES GESTAE.

Bouvier's Law Dictionary defines the term "res gestae" thus: "Transaction; thing done; subject matter."

Webster's New International Dictionary (2 Ed.) defines it thus: "The facts which form the environment of a litigated issue; the things or matters accompanying and incident to a transaction or event."

The Century Dictionary defines it thus: "Things done; material facts."

In order, therefore, for anything to be a **part of the res gestae** it must be a **part of the transaction or thing done or subject matter**; or a **part of the facts which form the environment of a litigated issue** or **of the things or matters accompanying and incident to a transaction or event**; or **a part of the things done or material facts.**

We find the following in Wigmore on Evidence, 3rd Ed., Section 1751:

> "* * * **The declarant must appear to have an opportunity to observe personally the matter of which**

**he speaks.** This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim 'the engineer did not reverse the lever' or 'the conductor did not read the train dispatcher's orders.'" (Emphasis ours.)

It is unnecessary to burden the court with a lengthy discussion of all the decisions, but we respectfully submit that, under the rule which is well established by such decisions and by eminent text-writers, the statements by the witness Drashman, called by the plaintiff in this case, to the effect that **some** man, who was **unknown** to him, standing in a little group of men which the witness reached after walking half a mile or more, following his learning of the accident, to the effect either that he **thought** something sticking out of the train struck Mr. Haney, or that something sticking out of the train struck him, or was supposed to have struck him, were clearly inadmissible.

Wigmore on Evidence, 3rd Ed., Sec. 1751;
Barker v. St. L., I. M. & S. Ry. Co., 126 Mo. 143;
Redmon v. Met. Str. Ry. Co., 185 Mo. 1;
Ruschenberg v. So. Elec. Ry. Co., 161 Mo. 70;
Bankers' Life Ins. Co. v. Reynolds, 277 Mo. 14, l. c. 22-24;
Landau v. Travelers Ins. Co., 276 S. W. 376;
4 Chamberlayne on Ev., 2893;
3 Wigmore on Evidence, 2nd Ed., Sec. 1747;
Woods v. So. Ry. Co., 77 S. W. (2d) 374;
22 C. J. 462, Sec. 550;
Sconce v. Jones, 121 S. W. (2d) 777;
Johnson v. So. Ry., 175 S. W. (2d) 802;
32 C. J., Sec. 410, p. 24;
Hartford Fire Ins. Co. v. Kiser, 64 Fed. (2d) 288;

Vicksburg & Meridian R. Co. v. O'Brien, 119 U. S. 99;
Beck v. Dye, 92 Pac. (2d) 1113 (Wash.);
Schuman v. Bader & Co., 227 Ill. App. 28;
Hines v. Patterson, 225 S. W. 642 (Ark.);
Tex. Int. Ry. Co. v. Hughes, 53 S. W. (2d) 448 (Tex.).

Plaintiff's counsel convinced the trial court that such statements by an unknown person, **who did not even claim to have been present when the accident occurred or to have seen it** (Rec. pp. 48-61), were admissible as part of the res gestae.

Such statements were not admissible as part of the res gestae, because there was no evidence tending to show that the unknown man in the group was present when the accident occurred, and, in fact, the plaintiff's witness, Drashman, from whom such statements were elicited at the trial expressly stated that **the man who made the statements did not claim to have been there when the accident happened or to have seen it** (Rec. pp. 48-61). It was essential to show that he was present. That burden was on plaintiff.

The rule is that in order for such statements to be admissible they must have been made **contemporaneously with the happening of the accident or at a time so closely connected therewith that the witness had no time to reflect so as to make up a story that was not true**; or, if the person making such statement had been rendered unconscious in the accident, then no matter how long he was unconscious, if he made the statement so promptly after regaining consciousness that it was spontaneous and without time to manufacture an untruth, the statement may be considered a part of the res gestae.

Under the authorities the quoted statements could not be properly admitted, since the man who is alleged to have made them was not rendered unconscious, was not

suffering from the effects of any violence (since he was not the one who was hurt) was not shown to have any personal knowledge on the subject of which he spoke, and at most was relating his story of a past event.

In Chamberlayne on Evidence, Vol. IV, 2893, the following statement is found:

> "To judicial administration, the automatic is the true. What a declarant asserts, not so much of himself as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact. That which judicial administration, nervous, as it were, at being deprived of the test of cross-examination, the greatest guaranty for the discovery of truth which the English jurisprudence has as yet been able to devise, fears in connection with such statements is reflection, the opportunity for adjusting facts to self-interest, consciously or unconsciously blending the true and false, coloring, distorting and preventing that which is real. In an instinctive automatic utterance, where the declarant speaks from his subjective or soul-mind rather than from the promptings of that which is habit, really conscious, this element of reflection is largely, if not wholly, absent. The speaker is not so much voluntarily declaring himself as instinctively reacting to an outside stimulus. More physically considered, it would rather seem that the transaction is speaking through the declarant than that the latter is consciously talking about the transaction."

Professor Wigmore, in III Wigmore on Evidence, 2 Ed., Sec. 1747, says:

> "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control; so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external

shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."

The admissibility of a statement or an exclamation of a bystander is discussed in 32 C. J. S., Section 410, p. 24, as follows:

"In order for a declaration or statement to be admissible as part of the res gestae, it must appear that it was made **by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.** As this rule implies, it is not necessary, in order to render a statement or act admissible as part of the res gestae, that it should have been made or done by one of the participants in the main transaction, but if it has the necessary connection with the main fact, it may be admissible no matter by whom it was made or done, **provided, in the case of a declaration, it relates to a matter of fact to which declarant might testify if called as a witness.** Accordingly, the exclamations or declarations of a mere bystander may be admissible as part of the res gestae, although there are numerous cases in which such declarations have been excluded." (Emphasis ours.)

Applying the rules and tests announced by the foregoing authorities, it seems too plain to require argument that evidence of the statements made by the unknown man who "looked like an I. C. switchman," according to the witness, should never have been admitted, but having been admitted, it should be treated as absolutely no proof at

all because having no probative worth whatever. The pages of the record on which those statements are printed might as well be blank pages, for the statements themselves are so utterly worthless that they cannot be considered in passing on the demurrer to the evidence.

Bearing in mind the rule to the effect that the statements must be **spontaneous** and that the burden of proving spontaneity rests upon the plaintiff who offers proof of such statements, let us see whether such statements were, under the evidence, spontaneous, or whether they were mere narration of a past event.

Did plaintiff bear the burden of showing that they were spontaneous utterances by a person who was present when the accident occurred and saw for himself what happened? That is the first question of all to be settled. The evidence absolutely fails to show any fact from which the jury could find that the man in the crowd who "looked like an I. C. switchman" was present when the accident occurred. The witness who testified that some man in the crowd stated that something sticking out from the side of the train hit Haney or that he **thought** something sticking out from the side of the train hit him, or that it was supposed to have hit him, expressly testified that **that man did not claim to have seen the accident** (Rec. p. 48). Not only did the plaintiff fail to bear the burden of showing that the unknown person was present, but he proved by his own witness that such unknown person **did not claim to have been present when the accident happened** (Rec. pp. 48-61). That fact in itself is sufficient to exclude the testimony, for if the man was not at the scene of the accident when it occurred, there could be no such thing on his part as a spontaneous utterance which was so closely connected with the happening of the accident when it occurred, that it could be said to be a part of the res gestae. That unknown man could not have testified to what he had not seen.

Again, plaintiff failed to meet the requirement of the rule regarding such evidence, because his own evidence expressly showed that the statements, if made at all, were made so long after the occurrence of the accident that the unknown man in the crowd making the statement had ample time to reflect upon what he had either seen or heard and to make up a tory which may have been based upon his own conclusion from things that he saw after the accident happened, or from the statements of others, either as to what they saw or what they concluded from the facts that they learned.

The evidence of plaintiff's witness was that he was up at the station, which the evidence showed was more than half a mile away from the scene of the accident, when he learned that a man had been hurt down at the Frisco switch, which was the place near which decedent was found unconscious. This witness testified that he and another witness walked through the railroad yards, a distance of over half a mile, and when they got down to where the plaintiff's decedent was lying a gang of switchmen were there (Abs. p. 69).

It does not appear how long after the accident the news got to this witness. After somebody saw the injured man upon the ground the news in some undisclosed way eventually reached Mr. Young at the station, half a mile from the scene of the accident, and he told the witness and they walked to the switch. In addition to that, it will be recalled that it was sometime after the Frisco train had passed the scene of the accident before a witness from the railroad yards went up to the switch to see why the light had not changed after the train had gone in, and he there found Haney. All the time necessary for those things to happen had elapsed before the unknown man in the crowd made his statement.

Since the test of the admissibility of evidence of such statements is **spontaneity**, and since there is a total failure

of proof of spontaneity by plaintiff upon whom the burden of proof on that subject rested, it necessarily follows that the evidence of such statements should have been excluded, because it was mere hearsay. The most strenuous and repeated objections were made to such evidence, but the court continually overruled all such objections.

While it is true that the length of time elapsing after the happening of the accident varies in different cases, and it need not always be shown that the statement was made at the scene of the accident, nevertheless in every case it will be found that the statement must have been made **spontaneously at the earliest possible moment after the accident occurred.** A man may have been knocked unconscious in the course of an accident. He may not have come to for three or four days, but if, as soon as he is able to talk intelligently he makes a statement as to how the accident happened, if he saw it, and the surrounding circumstances show that the statement is made spontaneously without any opportunity or attempt to make up a story or color the facts in any way, then the test of spontaneity is met and the evidence may properly be received.

But in this case it is not claimed that the speaker in the crowd was rendered unconscious; on the contrary, he was not even shown to have been present when the accident occurred. Of course his statement to the effect that he **thought** some object sticking out of the side of the car had hit Haney was inadmissible because it was a mere expression of opinion. But if he said that something sticking out of the side of the train hit Haney that was just as inadmissible on account of the circumstances above mentioned.

Such statements do not amount to anything. A verdict cannot be based upon them. A court, because such statements were improperly admitted cannot consider them in passing upon the demurrer to the evidence. We do not have here a case (like some cases) where defendant's coun-

sel was asleep on the job and allowed the hearsay evidence to be admitted without objection. The record reveals the most determined and persistent efforts on the part of counsel of both defendants to keep such evidence out of the record. It was repeatedly objected to as hearsay; motions were made to strike it out after it was admitted; and motions to discharge the jury on account of the bringing out of such improper testimony were made, and an instruction was requested, withdrawing it from jury's consideration, but all to no avail. The trial Judge simply could not see our point.

The question of the admissibility of this evidence is not a Federal question. It should be left to the Missouri court for determination.

(b) Eliminating the statement made by the unknown man in the group standing around Haney while unconscious from his injury, which statement must be eliminated in view of all of the authorities above cited, what have we left in this case on which plaintiff can base a right of recovery? The theory of the third amended petition on which the case was tried was that something was sticking out of or swinging from the Frisco train as it passed the point where Haney was standing after he had thrown the switch on the occasion in question, and struck him.

We shall demonstrate under another heading that even if plaintiff had offered evidence tending to show that some object sticking out of or swinging from the train actually killed Haney, the appellant, Illinois Central Railroad Company, could not be held liable for Haney's death on that account.

But it is important now to consider whether or not there was any evidence tending to show some such object either sticking out of or swinging from the train which caused Haney's death.

The authorities which we shall presently cite, and many others which could be cited, make it perfectly clear that where the most that can be said in favor of a plaintiff's case is that the injury could have resulted from a cause for which defendant was liable, or that it could have resulted from a cause for which the defendant was not liable, and where the evidence leaves the matter entirely to speculation or guesswork to determine which cause did produce the injury, the plaintiff has wholly failed to make a case and it is the duty of the trial court to sustain a demurrer to the evidence; and if the trial court has overruled the demurrer under such circumstances, it is the duty of the appellate court to reverse the judgment outright, as was done by the Supreme Court of Missouri.

Aside from the statement of the unknown man in the group above referred to (which is to be disregarded as hearsay), plaintiff's evidence at most merely tends to show that Haney was standing some distance away from the switch track upon a pile of cinders and gravel when the train passed, or after it passed. **The undisputed evidence, offered by plaintiff, showed that Haney had been struck on the back of the head to the right of the middle line and his skull had been fractured at that point.**

This fact proved that he was struck from behind, for the evidence showed that he fell forward and that the point where his head lay when he was found unconscious was six or eight feet north of the north rail of the Frisco track, and his feet and legs were extended straight out towards the north or slightly northwest (see evidence of plaintiff's witness, Bundy, Rec. p. 32).

According to all the laws of physics and common knowledge, if an object had swung out from the train as it was passing Haney while he stood on the mound, it would either have hit him in the forehead and knocked him backwards so that he would have lain with his feet towards the track; or, if it swung out just before it got to him, or was sticking out of the train, it would have struck

the right side of his head and knocked him to his left, for the train was eastward bound as it passed him. If an object swung out and caught him on the right side of his head, or if it was stationary and was projecting straight out from the train and caught him on the side of his head, he would necessarily have been thrown to his left side so that when he fell his unconscious form would have been lying on his left side and parallel to the Frisco track.

Petitioner now claims that Haney was found lying parallel to the track; but that is squarely in contradiction of the evidence of plaintiff's own witness Bundy (Rec. p. 32) and that of defendant's witness Brusso (Rec. p. 110), the two men who found Haney. Brusso testified (Rec. p. 110) that Haney was found lying face down on the right side of his face, a fact which was corroborated by the hospital record which plaintiff offered in evidence (Rec. p. 78) and which showed that "the right side of Haney's face was covered with dirty cinders ground into the face."

There is no theory which the evidence tends to support which would justify a finding that something from the train struck Haney in the back of the head or on the right side of his head.

If an assailant quietly slipped up behind him with a drawn pistol or with a piece of pipe and struck him a violent blow upon the back of his head, it could easily have fractured his skull in the back part of his head and would certainly have caused him to fall forward and land just where he was found unconscious a short time later. Tough characters frequented that place constantly (Rec. p. 29).

Plaintiff's witness, Dr. Turner, testified the wound could have been caused by a gaspipe or club or similar round object in the hands of some individual (Rec. p. 79).

Even if it could be said that it was just as probable that something sticking out of the train or swinging from it inflicted the blow which caused Haney's death as that some unknown assailant struck him from behind, one state of facts being no more clearly shown than the other, plain-

tiff's case would necessarily fall to the ground because of the rule to which we have above referred.

Hamilton v. St. L. & S. F. Ry. Co., 300 S. W. 787;
Bates v. Brown Shoe Co., 116 S. W. (2d) 31;
Pape v. Aetna Cas. Co., 150 S. W. (2d) 669;
Lappin v. Prebe, 131 S. W. (2d) 511;
Penn. R. R. Co. v. Chamberlain, 53 Sup. Ct. Rep. 391;
N. Y. C. R. R. Co. v. Ambrose, 50 Sup. Ct. Rep. 198;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
C. & O. Ry. Co. v. Stapleton, 299 U. S. 587, 53 Sup. Ct. Rep. 591;
A. T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50 S. C. 281;
A. T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458, 52 S. C. 229.

But when we add to that the physical facts showing that he could not have been injured by an object either protruding from or swinging from the train as claimed, in view of the injury found upon the back of his head and the position in which he was lying unconscious when discovered after the accident, it becomes all the more apparent that plaintiff wholly failed to establish the allegations of his petition as to how the accident occurred.

But the plaintiff went further and completely obliterated every chance of recovery on presumptions or circumstantial evidence by showing by Drashman, a witness whom plaintiff's counsel placed upon the stand, that said witness, after learning of the accident, inspected the Frisco train over its full length on both sides and that nothing whatever was found protruding from the train or loose on the side of the train so that it could have swung out as it passed the decedent (Rec. p. 67). This was corroborated by defendant's witness, Young (Rec. p. 123).

Discovering, no doubt, that he had completely ruined his case by the testimony of that witness whom he had put on the stand, plaintiff's counsel attempted to establish

the theory that the mail catcher arm which was fastened on the side of the mail car swung out from its position and struck Haney as it passed.

But that effort also ended in dismal failure, for the railway mail clerk whom plaintiff called as a witness and who was a man of vast experience, from which he had learned all about railway mail cars, how they are equipped and the position and action of such mail catcher arms, gave testimony which showed conclusively that, under no circumstances whatever, could the mail catcher arm have swung out more than one foot from the side of the car; that the lowest part of it was eighty inches (6 feet 8 inches) above the ground (which would have been more than a foot above Haney's head if he were on the level ground), and that the only way the arm could be made to operate was by opening the door of the mail car and using a lever on the inside of the door of the car for that purpose. When raised it would be nine feet above the ground and extend thirty inches from the car (R. pp. 97, 99). There was no occasion to raise it, for there was no railroad platform anywhere near the scene of the accident and consequently nothing on which a mail sack could be hung so that it might be taken off by means of the mail catcher arm.

There was not even a scintilla of evidence tending to show that anything protruding from the side of the train or swinging out from the side of the train struck Haney, and plaintiff's own evidence showed positively that such a thing did not and could not happen.

This makes the plaintiff's case far more clearly one without any foundation than even the class of cases referred to where either of two causes might have produced the injury, but the evidence failed to point clearly to the true cause. This reason for holding that plaintiff could not recover is even stronger than the one assigned by the Supreme Court of Missouri.

(c) The Illinois Central Railroad Company, even if held to be the employer of Haney, could not be held liable in this case, even if his fatal injury was caused by some object sticking out of the Frisco train or swinging from it.

If the evidence had showed (as it did not) that some object protruding from the train or swinging from it fatally injured Haney, there certainly was no evidence anywhere in the entire record tending in the least degree to show actual or constructive notice on the part of the defendant, Illinois Central Railroad Company, of the presence of such object on the side of the train or swinging from it.

A defendant is not required to use his imagination—a very fertile imagination at that—to study up things that he can conceive might possibly happen, disregarding entirely ordinary human experience and his own experience.

Urie v. Thompson, Tr., 176 S. W. (2d) 471;
Brewing Assn. v. Talbot, 141 Mo. 674;
State ex rel. v. Ellison, 271 Mo. 463;
Nelson v. C. Heinz Stove Co., 8 S. W. (2d) 918;
Brady & So. Ry. Co., 320 U. S. 476, 64 S. C. 232.

Of the millions of trains that have moved throughout this country in many years past, only in the rarest possible instances has it ever been found that something protruding from or swinging from a moving train injured someone, and in the few cases we have found, freight trains were involved. There are a few cases where a freight car door or a refrigerator car door had a broken hinge which permitted it to swing and strike someone near the track, or an object of some kind loaded on a flat car protruded too far from the side of the train and inflicted injury. Such things are not the usual experience of railroads, but are extremely rare and unusual. The train in question was not a freight train, but a vestibuled passenger train (Rec. p. 67); there was no reason even to imagine that a freight car door would be swinging out or that an

object would be protruding too far from the side of a flat car, for there were no flat cars or box cars in the train, it being a fast passenger train; and it was not this respondent's train.

(d) So far as the defendant, Illinois Central Railroad Company is concerned, we must not lose sight of the fact that the train from which plaintiff claimed some unknown object was protruding or swinging was not being operated by the Illinois Central, but by the Trustees of the Frisco, which is an entirely different railroad corporation. Therefore, the Illinois Central Railroad Company had neither the duty nor the power to inspect that Frisco train, and could not, by any possibility have discovered, up to the very moment when it passed Haney, that it had an object protruding or swinging from it, if there was any such object.

Bailey v. Stix, Baer & Fuller D. G. Co., 149 Mo. App. 656;
Poe v. I. C. R. R. Co., 73 S. W. (2d) 779;
Hoover v. Baldwin, 111 S. W. (2d) 1011;
Kelley v. Railroad, 105 Mo. App. 365;
Creighton v. Mo. Pac. Ry. Co., 66 S. W. (2d) 980;
Sharp v. Cleaning etc. Co., 300 S. W. 559;
Krampe v. Brewing Co., 59 Mo. App. 277;
Wojtylak v. Coal Co., 188 Mo. 260;
Powell v. Elec. Co., 195 Mo. App. 156;
C. & N. W. Ry. Co. v. Payne, 8 Fed. (2d) 332;
Hicks v. Mo. Pac. R. Co., 40 S. W. (2d) 512.

There is no evidence in the record tending to show that the respondent, Illinois Central Railroad Company, had any actual knowledge of an object either protruding from or swinging from the Frisco train on the occasion in question. Where is there any evidence in the record tending to show that the defendant, Illinois Central Railroad Company, ought to have had such knowledge—in other words, that it had constructive notice? There is no

such evidence. How could the Illinois Central Railroad Company know, as the train of another railroad came backing towards its station in the nighttime on such railroad's track over a public street which was unlighted, that there was an object either protruding or swinging from the side of the train? There was certainly no duty on the part of the Illinois Central Railroad Company to inspect the train of the Frisco Railroad. It was beyond its power to do so, and, therefore, there could be no breach of duty in that respect.

Besides all this, we have proof made by plaintiff's own witness, Drashman, that the Frisco train was inspected at the station shortly after it arrived there and before it had been moved and **that there was no object sticking out of it or swinging from it.** There were no freight cars in the train, as above stated, the doors were vestibule doors, all of which opened inward on the passenger cars (Rec. p. 67), and the doors on the express cars and mail car were sliding doors which could be operated only from the inside of the train and could, in no event, swing out, and the mail catcher arm on the mail car was shown by plaintiff's own witness to have been so situated and equipped that it could not have swung out more than one foot under any circumstances (Rec. p. 97) unless an employee inside of the mail car opened the door and by means of a lever inside of the car deliberately raised the catcher arm, and, even then, it could not have hurt anybody standing beside the track, for, at the lowest point it was eighty inches above the ground, when raised it was nine feet above the ground and extended out only thirty inches (Haney was only 5 feet 7½ inches tall [Rec. p. 95]), and there was no place anywhere near the scene of the accident where there would be occasion to use the mail catcher arm to take a mail pouch off of a stand provided for that purpose, and Haney's head was six feet from the track after he fell forward (Rec. p. 32) toward the track, so he had been standing at least 11 feet from the track.

But even if plaintiff had made proof of something sticking or swinging out from the train and killing Haney, his case would have been wholly wanting in the necessary element of notice to this appellant, even if it was the employer of Haney, of the existence of any object protruding from the train or swinging from it, and, therefore, plaintiff's case would have been wholly insufficient because of utter lack of such proof.

Because of failure to prove notice to defendant, Illinois Central Railroad Company, its demurrer to the evidence should have been sustained.

(e) It is axiomatic that a **defendant cannot be held for damages resulting from negligence unless some duty which rested upon the defendant has been breached.**

In cases of master and servant, it is a well-recognized rule that, while a master owes to his servant the duty to exercise ordinary care to furnish him reasonably safe appliances and a reasonably safe place in which to work, the master is not liable on account of injuries resulting to his servant by the use of appliances not furnished by the master or by reason of dangers incident to a place which is not furnished by the master as a place in which to work and over which the master has no control, so that if it is dangerous he has no power or authority to change it.

This rule is recognized throughout this country.

Troth v. Norcross, 111 Mo. 630;
Andrus v. Bradley-Alderson Co., 117 Mo. App. 322;
Loehring v. Westlake Cons. Co. & Roebling Const. Co., 118 Mo. App. 163;
Powell v. Walker, 195 Mo. App. 150;
Spurling v. LaCrosse Lbr. Co., 204 Mo. App. 29;
Pecher v. Howd, 273 S. W. 752.

Applying the rule in the foregoing cases to the facts in this case, we find that deceased was required by his employer (whoever that employer was, plaintiff claiming

it was Illinois Central Railroad Company, but his own proof showing that it was The Yazoo & Mississippi Valley Railroad Company) to go in the night time to throw a switch so as to permit a Frisco train to back into Grand Central Station in Memphis. Plaintiff's own evidence, however, revealed the fact that the switch which the deceased threw was a part of the equipment of the Frisco Railroad and the place where the deceased was standing when fatally injured was not on the Illinois Central property and the defendant showed it was **in a public street of the City of Memphis** (Rec. p. 136). Therefore, this respondent had no right or authority either to clean up the street and remove the pile of cinders and gravel upon which deceased was standing when injured, or to put up additional lights in said public street. Since there can be no right of recovery for negligence in the absence of the violation of a duty, as where the place to work is beyond the control of the master, it is certain that Illinois Central Railroad Company, even if it could be held to be the employer of Haney, could not properly be held liable to his administrator for damages growing out of his death.

(f) Since there is no evidence in the case tending to show that Haney was required by this defendant to stand upon the pile of cinders and gravel, and there was ample room between it and the track for him to stand while the Frisco train passed, and Haney was carrying a lantern, the presence of the pile of gravel and cinders was not a proximate cause of Haney's death, for he could have stood upon it in safety all night but for a separate, intervening act, for which this appellant was not liable and which it could not possibly foresee.

"Causa proxima non remota spectatur."

Harper v. St. L. Merch. Bridge Term. Ry. Co., 187 Mo. 575;

Brady v. So. Ry. Co., 64 Fed. (2d) 239, 320 U. S. 476;

Wecker v. Grafeman-McIntosh Ice Cream Co., 31 S. W. (2d) 974, l. c. 977;
Warner v. Ry., 178 Mo. 134;
Henry v. First Nat'l Bk., 115 S. W. (2d) 121;
State ex rel. Trading Post v. Shain, 116 S. W. (2d) 99.

(g) The Illinois Central Railroad Company, as was clearly and conclusively shown by plaintiff's own evidence, was not the employer of Haney.

We have carefully set forth in our statement of facts in this brief the evidence bearing on the subject of Haney's employment, and instead of repeating it here we respectfully refer the Court to that portion of our statement.

Pay checks for several months preceding Haney's death were identified by his widow and offered in evidence by her counsel. She testified that the endorsements on all except the last two of them were in Haney's own handwriting and that he got the money represented by the checks. As to the last two, one of them having been issued to him but not cashed before his death, and the other having been issued after his death, the endorsement on the back of each of those checks shows that by special arrangement The Yazoo & Mississippi Valley Railroad Company permitted Mrs. Haney to cash those two checks. Both the front and the back of the last check given, which covers the period from December 15, 1939, up to the date of Haney's death, have been reproduced by photostat and a copy will be found on page 105 of the Record.

Mrs. Haney's evidence shows that all of the other checks were precisely like the one of which a copy is reproduced in the abstract except for dates and amounts. Therefore, it was unnecessary to encumber the record with more than one copy, though they were all offered by plaintiff.

Plaintiff's counsel was able to confuse the jury about these checks because the diamond-shaped emblem of the

Illinois Central appears printed in two places upon them; the word "countersigned" appears upon the checks and part of that word is above the emblem and the name "Illinois Central" at the bottom of the checks. But the word "countersigned" evidently refers, not to the emblem and the printed name, but to the name of the person who countersigned the check and whose name was C. E. Lyon.

It is not at all uncommon for railroads to use a certain design on all their advertising matter and on their checks as well. For instance, we are all familiar with the banner that appears as the emblem of the Wabash, the keystone of the Pennsylvania, the triangle of the Alton, the red seal of the Missouri Pacific and the emblems used by other railroads, all of which refer to the entire system of which an individual railroad is a part. The undisputed evidence shows that the Illinois Central System is made up of three separate and distinct railroad corporations, one of which is The Yazoo & Mississippi Valley Railroad Company. It appears plainly on the face of the check in large letters at the top thereof that the check is that of The Yazoo & Mississippi Valley Railroad Company. The check is drawn on the treasurer of **that** company. The mere fact that an emblem with the name "Illinois Central" appears in two places on the check is wholly immaterial. Nowhere on the check does the corporate name of this appellant (Illinois Central Railroad Company) appear. Even if it had appeared from the evidence (which it did not) that The Yazoo & Mississippi Valley Railroad Company was a wholly owned subsidiary of the Illinois Central Railroad Company, nevertheless the entity of The Yazoo & Mississippi Valley Railroad Company would have remained wholly distinct from that of the Illinois Central Railroad Company, and the suit could not have been maintained against the Illinois Central Railroad Company for the negligence of The Yazoo & Mississippi Valley Railroad Company.

Plaintiff's attempts, through oral testimony of Mrs. Haney and her son and her daughter, to show that Haney wore a button with the name of the Illinois Central Railroad Company on it and that he had a pass issued by that company were not sufficient to establish the fact of his employment by The Illinois Central Railroad Company, as distinguished from The Yazoo & Mississippi Valley Railroad Company. The evidence of these three witnesses was so vague and contradictory that it proved nothing.

Then we have the testimony of the witness Bruso, who identified a button of the Brotherhood of Railroad Trainmen, a picture of which (Ex. 2) is found in the record opposite page 128, and the type of annual pass (Ex. 1), which is reproduced by photostat opposite page 119 of the abstract. Although Mrs. Haney and her son were called as witnesses in rebuttal, neither of them testified in rebuttal that the button and pass which Bruso had identified were different from those which Haney carried.

In addition to all that, Haney's superior, Mr. Burns (Rec. pp. 154-157), the trainmaster for The Yazoo & Mississippi Valley Railroad Company, whose duty it was to employ switchmen and switch tenders, testified positively that he was employed by The Yazoo & Mississippi Valley Railroad Company alone, and that he knew of his own knowledge that Haney, who was under him, was employed by that railroad company alone.

The testimony of Mr. Young, now in the employ of the U. S. Government but formerly superintendent of terminals for the Frisco, explained very clearly the relationship of the three railroads making up the Illinois Central System, and told how the bills were made out each month by the Yazoo & Mississippi Valley Railroad Company for the services rendered by Haney as a switch tender and how the Illinois Central Railroad Company was billed by the Yazoo & Mississippi Valley Railroad Company for such two-twelfths, which the evidence showed the Frisco paid the Illinois Central Railroad Company.

But even if Haney had been in the employ of the Illinois Central Railroad Company, when he was loaned to the Frisco Railroad Company, or hired to it, to perform certain duties, then when he engaged in those duties he was the servant of the Frisco Railroad Company and not the servant of the Illinois Central Railroad Company.

A very excellent and learned discussion of just such situation is found in an opinion by Chief Justice Taft in the case of Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, which held that an engine crew which was regularly employed by the Big Four Railroad Company but was turned over to the Chesapeake & Ohio Railway Company to do certain switching at a certain point, was, while doing such switching, in the employ of the Chesapeake & Ohio Railway Company, and when one of the men was injured he could not maintain a suit for damages under the Federal Employers' Liability Act against the Big Four Railroad Company, for which most of his services were rendered.

Other authorities support the same proposition. See:

Denton v. Y. & M. V. R. Co. et al., 284 U. S. 305, 52 S. Ct. 141, and cases therein cited.

There is no doubt whatever that the action in the case at bar is under the Federal Employers' Liability Act. That Act alone fixes the rights of employees who are injured or killed while engaged in interstate commerce. Plaintiff alleged that Haney and the defendant railroads were engaged in interstate commerce, and proved that fact. Therefore, since said Act is the only one under which recovery by a servant of a railroad can be had when doing such work as Haney was doing, and since the only persons who are entitled to the benefit of that Act are servants of railroads, it follows that Haney's representative cannot recover against the Illinois Central Railroad Company unless Haney was the servant of that railroad company

at the time of his fatal injury, and the evidence just reviewed shows that he did not bear that relationship to the Illinois Central Railroad Company. Therefore, there can be no recovery by his personal representative in this case against the Illinois Central Railroad Company.

The outstanding distinction between facts in the cases relied on by petitioner as justifying the granting of a writ of certiorari and the facts in this case is that in those cases **there was no question at all but that the operation of a train injured or killed the servant in question.** At least, there was ample evidence in every one of such cases clearly justifying submission to the jury of the issue of injury or death resulting from the operation of a train; while in the case at bar the evidence clearly shows that the decedent was not killed by the operation of the train and there was no substantial evidence from which a jury could properly have found that he was so killed, rather than by a cause for which this respondent was in no wise liable.

## CONCLUSION.

While the Supreme Court of Missouri assigned but one reason for holding that the plaintiff failed to make out a case entitling him to have it submitted to the jury, there were various other reasons above discussed on account of which, we respectfully submit, this court could properly hold that the Supreme Court of Missouri did right in reversing the judgment outright on account of failure of plaintiff to produce sufficient substantial evidence to warrant submission of the case to the jury.

We briefly summarize here our reasons for the above statement:

(a) As held by the Missouri Supreme Court the verdict rests purely upon speculation and guesswork as to what cause produced the death of Haney.

(b) Even if the accident happened as claimed by plaintiff, such accident was so unusual that it could not reasonably be foreseen by a reasonably prudent person exercising ordinary care.

(c) Even if it was negligence on the part of the Frisco Railroad Trustees to operate its train so that a mail catcher arm might swing out one foot, this defendant could not be liable, because there was no evidence tending to show that it had notice of such condition. (Parenthetically we may add that if the mail catcher arm swung out one foot and struck Haney, there is no fact from which it could be reasonably inferred that it did so because of negligence on the part of the Frisco Trustees.)

(d) Plaintiff's evidence wholly failed to reveal that the accident happened on Illinois Central property or on property over which it had any right to exercise control, and therefore, it could not be liable for failure to furnish light at said place or to remove the cinders and gravel north of the Frisco track.

The undisputed evidence showed that the point of accident was on a public street in the City of Memphis.

(e) No causal connection was shown between the presence of the pile of cinders and gravel and the happening of the accident. There was no evidence offered to show that this respondent required Haney to stand on said pile of gravel and cinders or that he could not have stood north or south of the same.

(f) The undisputed evidence—documentary evidence—offered by the plaintiff showed that Haney was an employee of the Yazoo & Mississippi Valley Railroad Company, not of the Illinois Central Railroad Co., and this was corroborated by undisputed evidence offered by this respondent.

(g) Frisco train No. 106 was not operated by the respondent.

It is therefore respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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